

1 THE HONORABLE RONALD B. LEIGHTON
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BBC CHARTERING & LOGISTIC GmbH & CO.
KG,

Plaintiff,

v.

VESTAS AMERICAN WIND TECHNOLOGY, INC.
and C.S. WIND TOWER COMPANY, LTD.,

Defendants.

At Law or In Admiralty

No. C09-5121RBL

**PLAINTIFF'S BRIEF IN OPPOSITION
TO DEFENDANT'S MOTION TO
DISMISS**

INTRODUCTION

By filing its declaratory judgment action in this Court, Plaintiff BBC Chartering & Logistics GmbH & Co. KG exercised its right to waive the foreign forum selection clause in the subject contract of carriage. Therefore, the forum clause does not prevent Plaintiff from bringing this action in this District, where Defendant is registered to do business, where the

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1 subject lost and damaged cargo was destined to be delivered, and where key witnesses are
2 located.

3 **FACTS**

4 For the most part, Plaintiff agrees with the recitation of facts provided in Defendant's
5 opening brief. This is a maritime case about damage and loss of cargo being transported
6 from Vietnam to Vancouver, Washington. Plaintiff was the "Carrier" that contracted to
7 perform that ocean carriage.

8 The vessel ultimately arrived at Vancouver, where a joint survey was performed as to
9 the lost and damaged cargo, and as to the likely causes of the loss and damage, this being
10 done out within about 24 hours of the vessel's arrival.

11 The contract of carriage between Plaintiff and Defendant regarding this shipment is
12 the bill of lading attached to the Complaint (*Dkt. No. 1*) and to Defendant's Motion to
13 Dismiss (*Dkt. No. 15*). A provision in the bill of lading provides that disputes shall
14 exclusively be determined in the courts of the country where Plaintiff ("the Carrier") has its
15 principal place of business. Plaintiff admits its principal place of business is in Germany.

16 However, Plaintiff denies Defendant's claim that Plaintiff "ignored" the forum clause
17 in the bill of lading. What Plaintiff did by filing this action in the Western District of
18 Washington was to waive that forum provision.

19 **ARGUMENT AND AUTHORITIES**

20 It is well established that a party may unilaterally waive any provision of a contract or
21 statute that is intended for that party's benefit. *Shutte v. Thompson*, 82 U.S. 151, 159 (1872);
22 *U.S. v. Mabry*, 536 F.3d 231, 237 (3rd Cir., 2008); *New York v. Microsoft Corp.*, 209
23 *F.Supp.2d* 132, 143 (D. D.C., 2002).

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1 The forum provision in the subject bill of lading was clearly intended for the sole
 2 benefit of Plaintiff. It provided that, regardless of the facts of a dispute under the bill of
 3 lading, suit would be pursued in Germany, where Plaintiff has its principal place of business.
 4 In its opening brief, Defendant admits this was a provision of "...[Plaintiff's] own choosing,
 5 to which [Defendant] was required to adhere in order to receive shipment of its cargo...."
 6 (*Dkt. 15, 5:1-2*). Since Plaintiff was the intended sole beneficiary of that provision, it was
 7 within Plaintiff's power to waive it.

8 That is what Plaintiff did by initiating suit in this District, based upon normal venue
 9 concepts, and in light of the fact the destination of the carriage was in this District, and the
 10 fact Defendant is registered to do business here. This Circuit has recognized that a party may
 11 waive a forum selection provision. *Sparling v. Hoffman Construction Company, Inc.*, 864
 12 *F.2d 635, 639 (9th Cir., 1988) (dicta)*.

13 In addition to Plaintiff's right to waive the forum clause in favor of litigation taking
 14 place in the Western District, locating the litigation here makes practical sense. Defendant is
 15 registered to do business in this State (see accompanying *Declaration of Marc E. Warner*,
 16 *para. 2*). The vessel was bound for and ultimately discharged cargo in this District. A
 17 marine surveyor retained by Plaintiff, who is based in Seattle, conducted an inspection of the
 18 cargo loss and damage, and an investigation as to the cause of the incident. A copy of
 19 Edward F. Travers & Associates' report of survey conducted on December 5 and 6, 2007,
 20 within three days of the loss and damage and within 24 hours of the vessel arriving at
 21 Vancouver is attached to the *Declaration of Marc E. Warner, para.3*. The survey report
 22 recites that Plaintiff's local surveyor engaged in a joint inspection of the cargo, in which
 23 representatives of Defendant, its insurer and various other entities participated (*pg. 2 of*

1 survey report). At least one of those other participants, David A. Dent, the surveyor
2 representing Defendant's cargo underwriters, resides in Portland, Oregon (see copy of Mr.
3 Dent's web page, as attachment to accompanying *Declaration of Marc E. Warner, para. 4*).
4 It obviously makes sense for the litigation to take place in this District, where key witnesses
5 as to liability and damages are within easy access.

6 **CONCLUSION**

7 Plaintiff exercised its right to waive the German forum clause, and Plaintiff's choice
8 to, instead, have the cargo dispute resolved here makes sense due to this District's substantial
9 connection with the facts and evidence in this matter.

10 Therefore, Plaintiff asks the Court to deny Defendant's Motion to Dismiss.

11 DATED this 1st day of June, 2009
12

13 /s/ Marc E. Warner

14 Marc E. Warner, WSBA #5937
15 Attorneys for Plaintiff
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to The Honorable Ronald B. Leighton, and all associated counsel of record.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Seattle, Washington this 1st day of June, 2009.

s/Diana L. Inscore

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